Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

Petitioner,

vs.

BARBARA SIBLEY,

Respondent.

On Petition for Writ of Certiorari to
the Florida Third District Court of Appeal

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

The Florida Third District Court of Appeal – the highest court of Florida in which a decision could be had in this matter – has now held that (i) it can invoke a waiver argument to determine an appeal which was not argued and from which relevant record evidence was excluded by that court and (ii) Petitioner can be barred from appearing *pro se* before that court. Accordingly, presented for review are three questions:

WHETHER the due process requirements of "notice" and "an opportunity to be heard" prohibit a state appellate court from invoking a waiver argument to determine an appeal when that argument was (i) not raised in the briefs or at oral argument before the court and (ii) failed to consider relevant record evidence excluded by the state appellate court?

WHETHER the Florida Third District Court of Appeal has violated Petitioner's fundamental right to access to court by its opinion which fails to find any instance of Petitioner filing frivolous, abusive or incomprehensible pleadings?

WHETHER, the Florida Third District Court of Appeal has violated Petitioner's fundamental right to access to federal court by sanctioning him "for pursuing his right to federal-court remedies" in violation of *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964)?

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

Petitioner, Montgomery Blair Sibley, prays that a writ of certiorari issue to review the judgment and opinion of the Florida Third District Court of Appeal entered on November 3, 2004, which the Florida Supreme Court declined to review citing lack of jurisdiction on April 5, 2005. Review is mandated as the Florida Third District Court of Appeal has (i) far departed from the requisite course of due process, thus denying Petitioner's rights, privileges and/or immunities under the United States Constitution and (ii) denied to Petitioner his fundamental right to access to court for redress of his grievances.

OPINIONS BELOW

The November 3, 2004, decision of the Florida Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-2.* The December 8, 2004, panel decision of the Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-22.* The December 8, 2004, En Banc decision of the Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-24.* The April 5, 2005 decision of the Florida Supreme Court declining to accept jurisdiction is reprinted in the appendix hereto, *Appendix-25.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The original action was upon a petition for dissolution of marriage upon which a final judgment of dissolution was granted on September 20, 1994.

The course of proceedings relevant to this petition commenced on April 26, 2002, when Respondent made a motion to have Florida Circuit Court Judge Lando quantify the attorney fees ordered by the Third District Court of Appeal in cases numbered 3D01-2173 and 3D02-102 and in the federal court case styled *Sibley v. Sibley*, Case No.: 01-2770-CIV-Huck.

Prior to any hearing on that motion, on August 20, 2002, Petitioner filed his "Seventh Motion to Disqualify" Judge Lando. Judge Lando has never ruled upon the "Seventh Motion to Disqualify". On August 27, 2002, Judge Lando commenced and concluded an evidentiary hearing without benefit of a court reporter on Respondent's April 26, 2002, motion for attorney fees without issuing a ruling. Significant for this petition, during the hearing Petitioner orally advised Judge Lando of the pending and unresolved "Seventh Motion to Disqualify" filed seven days earlier. She refused to rule upon it but instead continued the hearing.

When Petitioner attempted to raise the pending "Seventh Motion to Disqualify" at a hearing before Judge Lando held on November 22, 2002, Judge Lando herself precluded Petitioner from raising the issue when she misrepresented on the

record that she was briefly adjourning the hearing so that Petitioner could consult with his counsel to raise whatever issues were unresolved. Instead, without resuming the hearing, she incarcerated Petitioner without re-convening the hearing.

Some 191 days later, on March 6, 2003, Judge Lando entered her "Order Granting Motion for Attorney Fees" from the August 27, 2002, hearing – again without addressing the still-pending "Seventh Motion to Disqualify" her. In the intervening 191 days, both Petitioner and the Florida Third District Court of Appeal provided notice to Judge Lando that the "Seventh Motion to Disqualify" was pending and unresolved before her.

On June 19, 2003, a hearing was held before Judge Wilson – who had replaced Judge Lando on January 30, 2003, as the assigned Judge to Division 19 to which the matter is assigned – on Respondent's motions to compel payment of attorney fees and contempt. On July 1, 2003, Judge Wilson entered his order from the June 19, 2003, hearing entitled "Order on Petitioner/Former Wife's Motion to Compel Payment of Attorney Fees" (i) holding Petitioner-here in contempt, and (ii) directing that Petitioner-here pay the $33,119.70 ordered by Judge Lando on March 6, 2003, within 60 days or Father would be sanctioned, including being incarcerated.

On August 4, 2003, Petitioner filed his notice of appeal of Judge Wilson's July 1, 2003, order finding Petitioner in contempt. That appeal was assigned Case Number: 3D03-2083 and it is from this case that this petition arises.

Importantly, in preparing the record on appeal for Case Number: 3D03-2083, Petitioner moved to settle the record of the hearing held before Judge Lando on August 27, 2002, at which he raised the issue of the pending and unresolved "Seventh Motion to Disqualify" Judge Lando. "The trial court declined to approve the statement of proceedings. [Petitioner] moved to compel Judge Lando (who conducted the August 27, 2002

hearing) to settle the statement of proceedings. See Fla. R. App. P. 9.200(b) (4). [The Florida Third District Court of Appeal] treated the former husband's motion to compel as a petition for writ of mandamus and, after receiving a response, denied it." *Appendix-9, infra.*

Ignoring that Judge Lando had been apprised of the pending Seventh Motion to Disqualify her (i) on August 27, 2002, and (ii) four times during September 2002 by Petitioner and the Florida Third District Court of Appeal and (iii) refused to permit notice to her at the November 22, 2002 hearing before her, the Florida Third District Court of Appeal materially misrepresented the record on appeal and held:

> The former husband argues that [Judge Lando] should not have heard the motion because at that time of the hearing the former husband's seventh motion to disqualify the trial judge was pending. We reject the former husband's argument, as the point has been waived. The former husband correctly argues that when a motion for disqualification or recusal is pending, it is the court's duty to rule on that motion before ruling on anything else. See *Fuster-Escalona v. Wisotsky*, 781 So.2d 1063 (Fla. 2000). Further, it is not necessary for the movant to request a hearing. See *id.* However, disqualification motions cannot be used for "gotcha" litigation tactics. See *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1339 (Fla. 3d DCA 1979). In this case, the former husband and his counsel personally attended the hearing on the Emergency Motion. Nowhere in the transcript did they object that the hearing could not proceed until the court ruled on the pending motion for disqualification. A party cannot go to a hearing knowing that he has filed a motion for

> disqualification, make no mention of the pending motion, participate in the hearing, and then after receiving an unfavorable ruling, argue that the court must start over because there was a pending motion for disqualification. *Appendix-6.*

Additionally, during the pendency of the 3D03-2083, Respondent's counsel moved for sanctions stating:

> Undersigned counsel is no longer willing to sit by and watch this Court's limited resources be consumed by frivolous litigation, allow Respondent to pay funds to defend herself from Appellant's frivolous appeals and to allow his calendar to be placed in shambles as a result of the necessary filing of countless responses to Appellants appellate filings. Sanctions must be entered to limit Appellant's frivolous, baseless litigation pattern. Respondent requests that this Court refuse to accept further appeals from Appellant unless he is represented by counsel licensed to practice law in the State of Florida" (Respondent's Motion for Sanctions, page 2).

In response, Petitioner filed his response to the motion for sanctions on December 29, 2003. On March 9, 2004, Petitioner appeared to orally argue case Number: 3D03-2083 before a three-judge panel of that court which panel included Judges Juan Ramirez, Jr. and David L. Levy.[1] A subsequent oral

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[1] Judges Juan Ramirez, Jr. and David L. Levy subsequently disqualified themselves from 3D03-2083 upon Petitioner's allegations of improper *ex parte* communications with Respondent's counsel. This matter pends before this Court and is assigned Case Number: 04-1309. Additionally, the propriety of Judges Juan Ramirez, Jr. and David L. Levy's *ex*

argument was held before a new panel of judges: Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten. In both his written response and at both oral arguments, Petitioner raised his fundamental and constitutional[1] right to access court as grounds prohibiting the relief sought by Respondent. Moreover, the failure to make any finding of frivolousness and failure to give proper notice were also raised by Petitioner.

In its November 3, 2004, decision granting the motion for sanctions, the Third District stated in pertinent part:

> The former wife contends that the husband's appeals have repeatedly been shown to be without merit and have constituted an abuse of the legal process. Upon consideration of the motion, the former husband's response filed January 5, 2004, and after review of this court's files, we agree. . . .The former husband has served as an unending source of vexatious and meritless litigation. This has caused needless consumption of resources by the court system and needless expense to the former wife. Awards of attorney's fees have not served as a deterrent, as the former husband has not paid them. We conclude that the standards of *Lussy* are met. We have considered the criteria set forth in the *Safir* decision and conclude that those are met as well. We therefore prohibit the former husband from further self-representation in this court.

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[1] communications with Respondent's counsel pends before the Florida Supreme Court as Case No.: SC04-2129 as an ethics complaint against Judges Juan Ramirez, Jr. and David L. Levy made by Petitioner. These matters explain the motive of the Third District Court of Appeal's retaliatory opinion against Petitioner in 3D03-2083.

Appendix-17.

On November 12, 2004, Petitioner made a motion for rehearing challenging the panel in 3D03-2083 to cite even one case brought before it in which Petitioner was deemed to have filed –either by the Court or Respondent – a frivolous, abusive or incomprehensible pleading. Notably, in denying the motion for rehearing on December 8, 2004, the panel was unable to so do.

In the interim, on November 26, 2004, Petitioner filed an action in the United States District Court for the Southern District of Florida against the panel judges, Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten in 3D03-2083 and the Clerk of the Florida Third District Court. That case was assigned Case Number: 04-22984-Civ-Jordan. Contemporaneously with the filing of that suit, Petitioner moved for Emergency Injunctive Relief to stop the Clerk of the Florida Third District Court of Appeal from following the orders of the panel judges, Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten (i) barring Petitioner from further filing in that court and (ii) dismissing the pending matters in which Petitioner was the appellant, petitioner or counsel to the appellant or petitioner.

On December 8, 2004, the Florida Third District Court of Appeal granted in part Petitioner's motion for rehearing permitting only that Petitioner could file his "Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court". A copy of that December 8, 2004, panel decision of the Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-22.* Additionally, on December 8, 2004, the Florida Third District Court of Appeal, sitting *en banc* denied Petitioner's motion for rehearing *en banc.* A copy of that opinion is reprinted in the appendix hereto, *Appendix-24.*

On March 5, 2005, Plaintiff's appeals in (i) Case Number 3D04-294 (Second Son's intervention appeal), (ii) Case Number 3D04-803 (Appeal of the March 27, 2004, Judge Wilson order

limited Father's right to appeal) and Case Number 3D04-1266 (Appeal of order disbursing funds upon *ex parte* communication) were dismissed by the Florida Third District Court of Appeal based upon its order in Case No. 3D03-2083. Hence, appellate review of those matters has terminated in the Florida Courts as the Florida Supreme Court has no jurisdiction to review dismissed appeals without written explanation. *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002)

Additionally, on April 5, 2005, the Florida Supreme Court decline to review the Florida Third District Court of Appeal's holding in Case No. 3D03-2083. A copy of that decision of the Florida Supreme Court declining to accept jurisdiction is reprinted in the appendix hereto, *Appendix-25.*

On April 12, 2005, after oral argument but denying Petitioner an evidentiary hearing, Judge Jordan issued his Order Denying the Motion for Temporary Injunction. A copy of the April 12, 2005 Order Denying Motion for Temporary Injunction is reprinted in the appendix hereto, *Appendix-26.* Primarily, Judge Jordan denied the motion finding that he lack jurisdiction under the so-called *Rooker-Feldman* doctrine.

REASONS FOR GRANTING THE WRIT

There are three compelling reasons for granting the writ to review the decision of the Florida Third District Court of Appeal in Case Number 3D03-2083.

First, due process considerations, bound upon Florida by the Fourteenth Amendment, require notice and an opportunity to be heard prior to a decision being rendered by a court. Here, Petitioner was not afforded that opportunity as neither the appellate briefs nor the oral arguments raised the issue of "waiver" of the Seventh Motion to Disqualify, and accordingly, the Third District Court of Appeal's invocation of that doctrine without affording Petitioner and opportunity to be heard cannot stand.

Second, Petitioner's fundamental right to access to court for redress of his grievances cannot be curtailed – as the Florida Third District Court of Appeal has done here – without a showing of frivolous, abusive or incomprehensible behavior by a litigant.

Third, the Florida Third District Court of Appeal may not sanction Petitioner – as it has done here – "for pursuing his right to federal-court remedies" in violation of *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964).

I. Petitioner Was Denied Notice and An Opportunity to Be Heard on the Issue of Waiver of the Seventh Motion to Disqualify

This Court has recognized that an appellate court cannot sit as a jury and determine matters not noticed or raised on appeal. In *S.E.C. v. Chenery Corp.*, 318 U.S. 80; 63 S.Ct. 454; 87 L.Ed. 626 (1943), this Court held:

In confining our review to a judgment upon the

> validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. **But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.** (Emphasis added).

Here, this is exactly what the Third District Court of Appeal has done by denying to Petitioner "an opportunity to be heard" on whether there has been a "waiver" of the Seventh Motion to Disqualify Judge Lando. Indeed, this failure to accord Petitioner such an opportunity was further compounded when the Florida Third District Court of Appeal refused to permit Petitioner to introduce evidence in the record which would have factually precluded the finding of a "waiver".

II. The Right Of Access To The Courts To Seek Legal Remedy Is A Fundamental Right Secured By The Due Process Clause

The right of access to the courts to seek judicial remedy is a fundamental bedrock principle of the English common law rooted in the *Magna Carta*. It is among the most important of

the rights and liberties of the common law that Americans guaranteed for themselves under the Due Process Clause as well as the First Amendment.

As Justice Powell observed:

> The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Ingraham v. Wright, 430 U.S. 651, 673 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Among those essential privileges is the right to obtain redress from the courts. Early in our nation's history, Chief Justice Marshall declared:

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that the U.S. Supreme Court has held that the Fourteenth Amendment includes "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

The origins of that right, and its exercise free from improper interference by the judiciary – as the Florida Third District Court of Appeal has done to Petitioner here – are firmly rooted in the *Magna Carta* of 1215. The barons at Runnymede, determined to end the king's manipulation of the courts for his own purposes, particularly through the sale of writs, compelled King John to vow in Chapter 40: "To no one will we sell, to no one will we refuse or delay, right or justice." The re-issued *Magna Carta* in 1225 combined this provision with the seminal due process guarantee of Chapter 39 into Chapter 29. In the words of Sir Edward Coke, Chapter 29 guaranteed that, "every subject of this realme, for injury done to him...by any other subject... without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay." Edward Coke, *The Second Part of the Institutes of the Laws of England* 55 (London, E.&R. Brooke 1797).

Nearly everything the drafters of the United States Constitution understood of this principle was learned from Coke. His explication of the *Magna Carta*, first published in 1642, was widely read by the Founding generation. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment) ("The American colonists were intimately familiar with Coke"); Dick Howard, *The Road from Runnymede* 119-25 (1968).

Moreover, Lord Coke's explication of Chapter 29 was restated with approval by William Blackstone, whose treatise was also widely studied by 18th Century Americans. William Blackstone, *Commentaries on the Laws of England,* 141 (1765). Coke elevated the *Magna Carta* to its status as the source of all the fundamental principles of the common law, in which all the rules familiar to common law lawyers are grounded. Coke vigorously asserted the primacy of these principles as a limitation on the power of all government.

Intervention to close the courthouse doors – as the Florida Third District Court of Appeal has done to Petitioner – to prevent litigants from walking through them threatens the ability of the judicial branch to perform its constitutional function.

The degree to which this right is deemed fundamental to the American system of justice is reflected in the fact that 38 states – Florida notably among them at Florida Constitution, Article I, §2 – have incorporated in their state constitutions provisions guaranteeing the right of access and remedy patterned after Coke's language. See David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev., 1197, 1201 n. 25 (1992) (listing state constitutional provisions).

Although the U.S. Constitution does not contain a similar express guarantee, the adoption by the First Congress of the Fifth Amendment's guarantee of due process was an "affirmation of Magna Charta according to Coke." *Haslip* at 29 (Scalia, J., concurring). This Court has left no doubt that access to the courts is a fundamental right guaranteed by the U.S. Constitution:

(i) The Article IV Privileges and Immunities Clause - *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148, 52 L. Ed. 143, 28 S. Ct. 34 (1907); *Blake v. McClung*, 172 U.S. 239, 249, 43 L. Ed. 432, 19 S. Ct. 165 (1898); *Slaughter-House Cases*, 16 Wall. 36, 79 (1873);

(ii) The First Amendment Petition Clause - *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972);

(iii) The Fifth Amendment Due Process Clause - *Murray v. Giarratano*, 492 U.S. 1, 11, 106 L. Ed. 2d 1, 109 S.

Ct. 2765, n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 335, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985);

(iv) The Fourteenth Amendment Equal Protection Clause - *Pennsylvania v. Finley*, 481 U.S. 551, 557, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), and

(v) The Fourteenth Amendment Due Process Clause - *Wolff v. McDonnell*, 418 U.S. 539, 576, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 380-381 (1971).

A. A Litigant Must Egregiously Trespass Upon the Right To Access Before That Right May Be Impinged

Against this bedrock principal of fundamental right of access to the courts for redress, a limited exception has evolved in cases in which there is a showing of egregious abuse of the judicial process by a litigant. Those limited exception spring from instances when the litigant's pleadings are either (i) frivolous, (ii) abusive or (iii) incomprehensible.

At the federal level, that level of egregious abuse has been recognized when a petitioner filed "4 appeals, 33 petitions for certiorari, 99 petitions for extraordinary writs, 7 applications for stays and other injunctive relief, and 10 petitions for rehearing" all of which this Court recognized were "frivolous requests." *In re Jessie McDonald,* 489 U.S. 180, 181 (1989). Likewise, in *Judd v. United States Dist. Court for Western Dist. of Texas,* 528 U.S. 5, 6 (1999) this Court entered sanctions when "Judd had filed six petitions for certiorari, all of which were both **frivolous and had been denied without recorded dissent**. Since the Rule 39.8 denial, Judd has filed four petitions for certiorari, all of which were also **frivolous and denied without recorded**

dissent. The instant petition for certiorari thus brings **Judd's total number of frivolous filings to 12.**" (Emphasis added). Indeed, a clear finding of "frivolousness" is at the heart of the extreme sanction of limited access to court. *Accord*: *Martin v. Dist. of Columbia Ct. of Appeals*, 506 U.S. 1 (1992)("[A]ll of Martin's filings, including those before us today, have been demonstrably frivolous.")

At the Circuit Court level, in *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986), the Eleventh Circuit found that Procup had "filed 176 cases in the Jacksonville Division of the Middle District of Florida alone, not counting suits filed in other federal and state courts. Most of Procup's suits have been *pro se*, in forma pauperis civil rights actions under 42 U.S.C.A. Sec. 1983. None has reached the stage of trial on the merits; **most have been frivolous.** Procup often has filed repeated claims and failed to comply with court rules and procedures. His pleadings are long and rambling. He has ignored repeated warnings and admonitions from the district court." *Id.* at 1070.

Nonetheless, the 11th Circuit, in vacating the injunction identical to the injunction issued by the Florida Third District Court of Appeal against Petitioner, recognized that the District Court's injunction:

> . . . that Procup file suits only through an attorney may well foreclose him from filing any suits at all. A private attorney, knowing Procup's track record, might well be unwilling to devote the time and effort necessary to sift through Procup's generally frivolous claims to see if there is one of sufficient merit to undertake legal representation. A legitimate claim could well go undiscovered. Moreover, due to Procup's shotgun litigation techniques, attorneys in the legal services office already have found themselves as defendants in Procup's rambling pleadings. This

> not only would deter an attorney from representing such a difficult client, but also raises the possibility that, due to intra-office conflicts of interest, the legal services attorneys would be unavailable to represent Procup. **With the premise that Procup would simply be unable to get any attorney to represent him, the injunction then effectively enjoins Procup from filing any suit.** . . . An absolute bar against a prisoner filing any suit in federal court would be patently unconstitutional. **We, therefore, vacate the injunction and remand for consideration of such modification as will, as much as possible, achieve the desired purposes without encroaching on Procup's constitutional right to court access.** (Emphasis added).

Id. at 1071. *Accord*: *Green v. Carlson*, 649 F.2d 285, 287 (CA5 1981)("Flagrant abuse of the judicial process can enable one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants. See Camper, 477 F.Supp. at 770-71. The same pattern of malicious and frivolous filings is now apparent in this Circuit. Recognizing the need to curtail further frivolous and malicious filings, this Court will invoke its general supervisory power to control its docket."); *In re Martin-Trigona*, 737 F.2d 1254, 1261 (CA2 1984) ("Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions. . . .").

In *Safir v. United States Lines, Inc.*, 792 F 2d. 19 (2nd Cir. 1986) the seminal holding of that case was that "Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." *Id.* at 24. In *Safir*, the court found that as a matter of fact that vexatious litigation

included:

> Safir's somewhat novel litigation tactics can only be characterized as senseless and unduly burdensome. He moved to dismiss one appeal on the ground that the defendants had conspired to bribe President Nixon to defeat his litigation. He also sought to discover the "Nixon tapes" in the belief that officials in the Nixon administration conspired with the defendants to prevent him from vindicating his rights. In another action, he sought to have the judge disqualified because he allegedly was a friend of President Nixon. Similarly, Safir has sought collateral relief *pendente lite* in many of his actions, including this one, alleging that the defendants were dissipating their assets to prevent him from enforcing potential multi-million dollar judgments. In this regard, he has sought to enjoin the sale of ships, shares of stock and other assets and to have proceeds of such sales placed in escrow; to enjoin a stockholder's meeting; and to enjoin the government from paying subsidies to the defendants and from approving the sale of stock in which neither the buyer nor the seller were defendants in Safir's actions. In light of the patently meritless nature of these motions, they can be viewed only as attempts by Safir to harass the defendants. Another example of such harassing and baseless litigation was more recently displayed when Safir brought involuntary bankruptcy proceedings against four of the defendants. That action was predicated on the untenable theory that because Safir was about to win prodigious judgments from the defendants, they would be unable to satisfy the claims and be forced into bankruptcy. The

> bankruptcy court found Safir's petition to be a clear abuse of the judicial process, and assessed costs and attorneys' fees against Safir.

Id. at 25.

Plainly, before a court may step in and limit a litigants's fundamental right to access to court, egregious behavior must be found to have existed and be expressly documented by the sanctioning court. "Demonstrably frivolous" is the standard that must be met. *Martin* at 2.

As shown below, no such behavior by Petitioner can be found in any of his twenty-five appeals. As such, it is a violation of Petitioner's fundamental right to access court for the Third District Court of Appeal to *ex cathedra* ban Petitioner from their court.

B. The Florida Third District Court of Appeal Did Not Make the Requisite Findings of Fact That Petitioner's Appellate Matters Were Frivolous, Abusive or Incomprehensible.

Based upon the foregoing, it is plain that before a litigant may be barred from court as Petitioner was barred here, the court must make findings of fact – grounded in fact – that a litigant's pleadings were (i) frivolous, (ii) abusive or (iii) incomprehensible. This, the Florida Third District Court of Appeal neither did nor could do. As such, their order of November 3, 2004, impermissibly trespassed upon Petitioner's fundamental right to access to court.

The sum total of facts recited by the panel to justify the sanction imposed upon Plaintiff was grounded in three areas.

1. **Petitioner's Motive** - First, an un-cited, undated, out of context quote attributed to Petitioner in a eight year old letter to his former wife. Besides the lack of notice of utilization of such quote as discussed *infra*, the *ad hominem* attempt by the panel to impute an improper motive to Petitioner is irrelevant to considerations here. Regardless of the subjective intent of a litigant in pursuing litigation, it can only be the objective consideration of the frivolousness of the pleadings that must be utilized to determine whether sanctions should be imposed. To hold otherwise opens the door for a court to subjectively impute to a litigant *mala fides* and, notwithstanding objectively non-frivolous pleadings, make the determination that such intent justifies barring the courthouse door to a litigant.

2. **Lack of Merit** - Second, after listing Plaintiff's twenty-five matters filed in the Third District Court of Appeal, the panel simply concludes – without citation to any of the decisions in those matters – that "the former husband's subsequent *pro se* proceedings in this court have been found to have no merit. As is shown by this appeal, the former husband has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so." *Appendix-12.*

Notably, the panel judges, Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten do not state – as they could not – that any of those twenty-five matters were (i) frivolous, (ii) abusive or (iii) incomprehensible.

Instead, they make the conclusory statement that the twenty-five matters "have not merit". The "have not merit" determination has never been a criteria for denying a litigant access to the court. If it were, then every litigant who does not prevail on an appeal would be subject to denial of access to the court. Moreover and of note, none of the twenty-five matters was dismissal for lack of jurisdiction or for frivolous filings.

Perforce, a review of those twenty-five matters reveals that in all but three of them, the decision of the panels were *per curiam* without written opinion. Hence for the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten to speculate upon the "merits" of those appeals is an *ex post facto* exercise undertaken towards an apparently foregone conclusion.

Indeed, as one court has noted, "In rendering the decree for the plaintiff, the chancellor stated that he relied on the *per curiam* decision of *Hoffman v. Drennen*, Fla.1956, 88 So.2d 624. This was a decision without opinion affirming a decree. We are of the view that such a decision does not establish any point of law; and there is no presumption that the affirmance was on the merits." *Schooley v. Judd,* 149 So.2d 587, 590 (Fla.App. 2 Dist. 1963). As such, even if lack of merit were a basis to deny access to court, the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten were simply speculating as to the merits of the twenty-one cases decided *per curiam* without written opinion, many of them issued by panels upon which they were not sitting. Speculating by judges as to the reasons other matters were determined is no basis for denying Petitioner his fundamental right to access to court.

Moreover, the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten in a blaring example of infidelity to the impartial consideration of all the facts fail to note in their opinion that in not one of Petitioner's twenty-five appeals were sanctions imposed upon Petitioner by the various panels under Rules of Florida Appellate Procedure, Rule 9.410. That rule authorizes the court to "impose sanctions for any violation of these rules, or for the filing of any proceeding, motion, brief, or other paper that is frivolous or in bad faith."

As to the second statement – "As is shown by this appeal, the former husband has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so" the panel judges Gerald B. Cope, Jr., Melvia B. Green and

David M. Gersten's conclusory statement is simply wrong. In fact, in their decision of November 3, 2004, there is only one reference to an attempt by Petitioner to "re-litigate matters decided in earlier proceedings"– the March 4, 2003, order of the circuit court – calling into question the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten's reckless use of the plural "matters" when accuracy demands that the singular "matter" be utilized.

3. **Petitioner's Federal Actions** - Finally, the twelve actions in federal court cited by the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten are of no moment in their determination of the sanction imposed here.

First, noteworthy is that – with one exception – Federal Rule of Civil Procedure, Rule 11 sanctions were not imposed on Petitioner by the federal courts which heard these matters resulting in the obvious conclusion that these matters were not frivolous.

Indeed, in two of them Plaintiff made significant federal law.[2] Moreover, as noted by the panel judges Gerald B. Cope,

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[2] In *Sibley v. Schwartz*, Case No.: 01-3746-Civ-King, *affirmed*, No. 01-16571 (11th Cir. 2001), contrary to Judge King's holding that Defendant Judge Lando enjoyed absolute judicial immunity, the Eleventh Circuit held for the first time in this circuit that "[a]lthough absolute judicial immunity shields state court judges from suits seeking damages for acts taken in their judicial capacity, 'judicial immunity is not a bar to prospective injunctive relief' in 42 U.S.C. § 1983 suits against judicial officers acting in their judicial capacity. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984)."

Additionally, in *Sibley v. Lando*, Case No.: 03-21885-Civ-Huck, *rev.* No. 03-14910 (11th Cir. 2004), the 11th Circuit,

Jr., Melvia B. Green and David M. Gersten, all but one of the remaining nine federal suits were dismissed as an act of abstention discretion by the federal courts under *Rooker-Feldman* and *Younger* doctrine principles.

III. Petitioner May Not Be Sanctioned In State Court for Asserting his Federal Rights

The Florida Third District Court of Appeal held

> In addition, the former husband has filed at least twelve actions in federal court against judges who have been assigned to his cases, the court system, and the former wife. . . . The former husband has served as an unending source of vexatious and meritless litigation. This has caused needless consumption of resources by the court system and needless expense to the former wife. Awards of attorney's fees have not served as a deterrent, as the former husband has not paid them. We conclude that the standards of *Lussy* are met. We have considered the criteria set forth in the *Safir* decision and conclude that those are met as well. We therefore prohibit the former husband from further self-representation in this court." *Appendix-13.*

Such a holding clearly impinge on the right to access

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reversed the dismissal of the lawsuit Plaintiff brought against Judge Lando for her unlawful imprisonment of him and reinstated the matter holding "For the foregoing reasons we find that the district court (1) erred when it applied the *Rooker-Feldman* doctrine as a jurisdictional bar to Sibley's claims; (2) abused its discretion when it abstained from hearing Sibley's claims under the *Younger* doctrine."

federal courts recognized in *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964), where this court unequivocally stated:

> Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they resented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. **That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise.** (Emphasis added).

Hence, the panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten have sanctioned Petitioner in state court because he sought relief in federal court as was his right under federal access to court guarantees. By doing so, panel judges Gerald B. Cope, Jr., Melvia B. Green and David M. Gersten have violated the proscription against such action by a state court under *Donovan.*

In particular, as noted in footnote #2, *supra*, two of the federal suits Petitioner filed were anything but frivolous.

Moreover, the Florida Third District Court of Appeal has sanctioned Petitioner for exercising his right to remove a state matter to federal court as guaranteed by 28 U.S.C. §1441. In *Sibley v. Sibley,* United States District Court, Southern District of Florida Case No. 01-1349, as a matter of discretion, Judge

Gold returned the matter to the Florida Court under *Younger* abstention principals, Petitioner's right to seek such a removal cannot be punished by the Florida Courts as done here without doing violence to the holding of this Court in *Donovan.*

Indeed, what the Florida Third District Court of Appeal has reserved unto itself – now without possibility of review save by this Court – is the right to bar a litigant not because his pleadings are frivolous, abusive or simply incomprehensible but solely because a litigant is zealous to the point of litigiousness. As repeatedly recognized by the Federal Circuit Courts, litigiousness alone will not support an injunction restricting filing activities. *Accord*: *In re Oliver*, 682 F.2d 443, 446 (3d Cir. 1982); *Pavilonis v. King*, 626 F.2d 1075, 1079 (1st Cir.), *cert. denied*, 449 U.S. 829(1980); *Castro v. United States*, 775 F.2d 399, 408 (1st Cir. 1985); *Ruderer v. United States*, 462 F.2d 897, 899 (8th Cir.), *cert. denied*, 409 U.S. 1031(1972).

CONCLUSION

Accordingly, this Court must review the decision of the Florida Third District Court of Appeal in 3D03-2083 as (i) Petitioner has no right to review in the United States District Court under the *Rooker-Feldman* doctrine as applied by Judge Jordan in his Order Denying the Motion for Temporary Injunction and (ii) Petitioner's right to access court will be destroyed by the Florida Third District Court of Appeal's expanded authority to bar litigants from its court based only upon a litigant's " litigiousness".

Respectfully submitted,

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